

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 05-CR-060

-against- : U.S. Courthouse

: Brooklyn, New York

MICHAEL MANCUSO  
ANTHONY INDELICATO  
ANTHONY DONATO  
ANTHONY AIELLO

Defendants : July 17, 2008

- - - - - X 2:00 p.m.

BEFORE:

HONORABLE NICHOLAS G. GARAUFIS  
United States District Judge

APPEARANCES:

For the Government: BENTON J. CAMPBELL, ESQUIRE  
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Brooklyn, New York 11201  
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4 New Haven, Connecticut 06510  
5 BY: RICHARD A. REEVE

6 For the Defendant: SERCARZ & RIOPELLE, LLP  
7 Anthony Donato 152 West 57th Street  
8 New York, New York 10019  
9 BY: MAURICE H. SERCARZ

10 For the Defendant: SUSAN G. KELLMAN  
11 Anthony Aiello 25 Eighth Avenue  
12 Brooklyn, New York 11217

13 Court Reporter: RONALD E. TOLKIN, RMR  
14 Official Court Reporter  
15 225 Cadman Plaza East  
16 Brooklyn, New York 11201

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1 (Time noted: 2:18 p.m.)

2 THE CLERK: United States of America against  
3 Michael Mancuso, Anthony Indelicato, Anthony Donato, and  
4 Anthony Aiello. Docket Number 05-CR-060.

5 THE COURT: Please be seated.

6 THE CLERK: Counsel, please state your appearances  
7 for the record.

8 MR. GOLDBERG: Jeffrey Goldberg and Taryn Merkl for  
9 the Government.

10 Good afternoon, Your Honor.

11 MS. MERKL: Good afternoon.

12 THE COURT: Good afternoon.

13 MR. MANCUSO: Good afternoon, Your Honor.

14 THE COURT: Mr. Mancuso. Good afternoon,  
15 Mr. Mancuso.

16 MR. SCHOEN: David Schoen and John Mitchell for  
17 Mr. Mancuso.

18 THE COURT: Good afternoon.

19 Mr. Indelicato.

20 MR. INDELICATO: Good afternoon, Your Honor.

21 THE COURT: Good afternoon, sir.

22 MR. REEVE: Richard Reeve on behalf of  
23 Mr. Indelicato.

24 Good afternoon.

25 THE COURT: Good afternoon.

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1 Mr. Donato.

2 MR. DONATO: Good afternoon, Your Honor.

3 THE COURT: Good afternoon, Mr. Donato.

4 MR. SERCARZ: Maurice Sercarz for the defendant,  
5 Mr. Donato.

6 Good afternoon.

7 THE COURT: Good afternoon.

8 And for Mr. Aiello.

9 MR. AIELLO: Good afternoon, Your Honor.

10 THE COURT: Good afternoon, Mr. Aiello.

11 MS. KELLMAN: Good afternoon, Your Honor.

12 Susan Kellman appearing for Anthony Aiello.

13 THE COURT: All right. Very well.

14 Before we start with the -- with oral argument on  
15 the -- on the motions, I just have one bit of news for those  
16 who practice regularly before the court. Judge Matsumoto was  
17 confirmed this afternoon as a United States District Judge.

18 So, let's get started. Who's --

19 Yes, Mr. Schoen.

20 MR. SCHOEN: I just did this to try to make things  
21 a little easier. We sort of agreed on an order among  
22 ourselves.

23 THE COURT: Well, tell me what order that is that  
24 you have agreed to among yourselves.

25 MR. SCHOEN: If it meets the Court's approval,

1 Your Honor.

2 First Mr. Sercarz is going to discuss the motions,  
3 that caveat that Mr. Donato, if -- we all have, I suppose,  
4 joining in all clauses and all of the motions. We've all  
5 joined in all the motions. Mr. Sercarz will start off. The  
6 Government will respond to that, and then Mr. Reeve was going  
7 to go next and then Mr. Mitchell and then I was going to go.

8 THE COURT: All right.

9 MR. SCHOEN: And then I guess they would discuss the  
10 anonymous jury again. We didn't really discuss this at all,  
11 but well, whatever you think. That is the Government's  
12 motion.

13 THE COURT: I have seen everything that you have  
14 submitted; so --

15 MR. SCHOEN: Yes.

16 THE COURT: -- hopefully you will provide an  
17 epiphany application of your positions so that we can move  
18 with some efficiency.

19 MR. SCHOEN: Yes, Your Honor.

20 THE COURT: So why don't we start with Mr. Sercarz.  
21 Sir, come on up.

22 MR. SERCARZ: Thank you, Your Honor.

23 You will be happy to hear that I don't intend to be  
24 up here for too long, Your Honor.

25 I've got two motions that I briefed and that I want

1 to discuss briefly with the Court. The first is the motion to  
2 dismiss that I made in connection with the count of murder in  
3 aid of racketeering, Mr. Donato's counts.

4 And I must say as an officer of the court, that I'm  
5 aware that the Court has already ruled in the context of  
6 Mr. Basciano's motion for a new trial, that the Santoro  
7 homicide qualifies as a Racketeering Act, and that that -- the  
8 logic of that decision would foreclose the argument that I am  
9 making.

10 I also note and take account of the arguments in  
11 Mr. Goldberg's papers to the effect that my motion may be  
12 premature.

13 Nevertheless, Your Honor, we are aware of the  
14 evidence as to the Santoro homicide because the Court has  
15 heard it in two separate trials. We are aware regarding  
16 a motive that was ascribed for this homicide. And  
17 notwithstanding the arguments that the Government has made  
18 in its responsive papers, I would respectfully submit that  
19 if Mr. Basciano's motive in having this murder committed --  
20 and that is the Government's theory of the case -- is to  
21 preempt the kidnapping of his child, that under those  
22 circumstances the defendant cannot be guilty of murder in aid  
23 of racketeering.

24 And I am aware of the Government's argument that  
25 in order to commit this homicide he sought the aid of the

1 Genovese crime family and that people went along in assisting  
2 in this homicide because Mr. Basciano was -- and I think I'm  
3 quoting from Mr. Goldberg's papers -- a trusted Lieutenant of  
4 the -- a trusted soldier, rather, in the Bonanno family.

5           Nevertheless, not every -- with all due respect, not  
6 every private vendetta in which members of organized crime are  
7 enlisted qualifies as murder in aid of racketeering. The  
8 purpose of the act of violence, the violence or the murder,  
9 has to be related to the conduct of the enterprise, I would  
10 respectfully submit, in the same way that predicate acts must  
11 be related.

12           And in this case what you have, not to use a glib  
13 phrase, is the use of racketeering in aid of a murder, not  
14 murder in aid of racketeering. I don't think that the  
15 Government in the two prior trials of Mr. Basciano advanced  
16 a coherent theory as to why this murder benefited the Bonanno  
17 crime family or benefited the members of the Bonanno crime  
18 family, which would permit support for this count in the  
19 context of this indictment against my client.

20           And I recognize that we haven't even discussed the  
21 issue of the possible motive that my client may have had, and  
22 for his benefit and the benefit of the other defendants, I  
23 must presume that the Government can prove involvement for the  
24 purpose of this application.

25           But even leaving aside questions of the motive of

1 alleged participants, if the act itself is not for the purpose  
2 of racketeering, I respectfully submit that the charges cannot  
3 be made and this Court knows enough to know that this count  
4 cannot be sustained even though the language of the count  
5 tracks the indictment.

6 That is all I have to say on that subject.

7 THE COURT: Thank you.

8 MR. SERCARZ: But with regard to the -- the second  
9 item that I briefed, which is the need to have a statement  
10 that conforms to the criminal procedure law regarding the  
11 Government's proffered expert witness, Mr. Carillo. I  
12 understand that the Government has furnished us with  
13 transcripts; that there are others that are publicly available  
14 to us. I don't think that that qualifies, under the Federal  
15 Rules, as a suitable substitute because we still don't know  
16 exactly what it is that he intends to say at this trial. Much  
17 of it may be objectionable, and the only way to get proper  
18 rulings on that is to know in advance.

19 Now, the Government in its papers has limited the  
20 scope of Agent Carillo's testimony at our trial. And I note  
21 that it is at Page 36 and 37 of the Government's moving papers  
22 they describe that -- and I don't need to quote it all for the  
23 record, but they set limits on the testimony they intend to  
24 elicit from Agent Carillo. Again, not with as much  
25 specificity as I would request, not with as much specificity



1 as is required by the motion -- by the rules, but we are  
2 getting closer.

3 Here is what I would propose, Your Honor. Given  
4 that we have this limitation, and given that we do have the  
5 transcripts, and given that the Court has already indicated  
6 that there's going to be a second round of motion papers in  
7 this case, what I propose is that using this as a limit and  
8 reviewing the transcripts of Carillo's testimony in the  
9 Basciano trial that at the time that the new motions are due,  
10 we make a motion in limine specifically seeking to limit  
11 Agent Carillo's expert testimony in any way that we feel is  
12 inappropriate. And in that way we are arguing about things  
13 that are concrete rather than wasting the Court's time with  
14 theoretical arguments that the Court may not need to deal  
15 with.

16 That is it from me.

17 THE COURT: Thank you.

18 Mr. Goldberg.

19 MR. GOLDBERG: Ms. Merkl will be arguing these  
20 points.

21 MR. REEVE: May I just make a suggestion, which is  
22 I filed the motion to dismiss. I have a few brief comments.  
23 It is very related to the motion to dismiss on behalf of  
24 Mr. Donato. It might make sense for me to just address  
25 that --

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1 THE COURT: That's fine.

2 MR. REEVE: -- and then the Government can address  
3 it collectively.

4 THE COURT: That is fine.

5 MR. REEVE: Thank you.

6 And I want to just clarify the record because the  
7 situation is different now than it was when the motion to  
8 dismiss was filed. There is now a new indictment. It's S-9.

9 THE COURT: Yes. I'm going to get to that as to --  
10 there may be an S-10.

11 Will there be an S-10.

12 MR. GOLDBERG: There may be, Judge. Yes.

13 THE COURT: Well, does S-9 contain everything that  
14 it is supposed to?

15 MR. GOLDBERG: Yes.

16 THE COURT: In other words, that you intended to.

17 MR. GOLDBERG: It does. There was an item that was  
18 accidentally deleted from S-9 when we sought S-9. It is in  
19 S-8. It is the Anthony Aiello gambling charge. That will be  
20 added, put back in through S-10. But no other changes.

21 THE COURT: All right. So S-9 contains everything  
22 except that one item that's in S-8 that was left out of S-9.

23 MR. GOLDBERG: Yes. If I could just briefly  
24 summarize the difference between S-8 and S-9.

25 THE COURT: Yes. Why don't you do that. That might

1 help.

2 MR. REEVE: That was what I was just going to  
3 address. But I'll -- I'll defer. It relates to my motion.

4 THE COURT: Well, he may answer some question that  
5 you have by telling us what is going on with S-9.

6 MR. GOLDBERG: Right.

7 You saw the letter, and I am happy to summarize.

8 The additional -- an additional predicate act  
9 against the Defendant Indelicato, a marijuana charge. There  
10 were two predicate acts dropped as to Defendant Aiello. There  
11 was an additional Racketeering Act against Aiello that was  
12 dropped. I just mentioned that; that was dropped  
13 inadvertently. That will be put back. The date of the  
14 Pizzolo murder was changed by a day. It wasn't the day that  
15 the body was found but the day that the murder actually was  
16 committed.

17 I think that is it.

18 THE COURT: Okay.

19 MR. REEVE: And Your Honor, it was in reference to  
20 the first change that I think obviously impact on the motion  
21 that I filed. Namely, at the time of S-8 in the filing of the  
22 motion, Mr. Indelicato was charged with Racketeering Act 2,  
23 which is the Santoro murder; and then Racketeering Act  
24 Number 4, which relates to the conspiracy to murder of  
25 Mr. DeFilippo. There is now a Racketeering Act Number 9 which

1 names Mr. Indelicato with a marijuana conspiracy.

2 And so even if the Court were to accept, at this  
3 or some other time in the case, my arguments with respect to  
4 Racketeering Act Number 2, obviously that would not warrant  
5 dismissal given the third racketeering act that is alleged.  
6 It would not warrant dismissal of Count 1, which is what  
7 my motion says, and it has now been obviously outdated by  
8 that change in the indictment.

9 However --

10 THE COURT: I see.

11 MR. REEVE: -- and -- and like Mr. Sercarz, I think,  
12 and I do need to note that the Court -- and I believe it was  
13 in two rulings in Basciano. There was a ruling on pretrial  
14 motions in the Basciano case. It was January 3rd of 2006 --

15 I am sorry, Your Honor. I don't have the docket  
16 number in front of me.

17 -- in which the Court ruled that the claim on the  
18 Santoro murder in the context of a pretrial motion was  
19 premature, and I think that obviously is relevant to the claim  
20 that I am making now.

21 In addition, based on the evidence at that first  
22 Basciano trial -- and I do have the docket number for this  
23 ruling. It was Docket Number 660 -- it was decided on or  
24 about December 21st of 2006.

25 And Your Honor denied Mr. Basciano's motion for

1 judgment of acquittal on the Santoro murder. The claim there  
2 that was made was it was not sufficiently related to the  
3 enterprise on both horizontal and vertical grounds, and Your  
4 Honor denied that claim. And so obviously those -- those  
5 rulings are relevant to the issues that are raised here.

6 I think that the claim that I have made, which to my  
7 knowledge has really not been squarely addressed by the  
8 Court -- and I could be wrong about this -- is the specific  
9 language in Paragraph 9 of S-9, and that is the language which  
10 after the Government gets through all the -- what I would  
11 refer to as more ordinary allegations with respect to  
12 enterprise activities.

13 They then go on to say from time to time members of  
14 this enterprise committed acts of violence. And I believe the  
15 language is "to solve personal grievances and vendettas."

16 I don't believe, Your Honor, that that language  
17 squares with the case law that has been cited, frankly, by  
18 both parties. I don't think that it -- it squares with the  
19 language of the Second Circuit in *Bruno*, which is a case  
20 relied on by the Government and that the Court has alluded to.  
21 I think that it goes so -- it makes it so broad that it  
22 almost -- to the degree it is inconsistent with *Bruno*, I don't  
23 think it should be in the indictment in that form because I  
24 think it misleads the jury. It is going to be inconsistent,  
25 I think, with the instructions that Your Honor is going to

1 give because I don't think that a murder that is committed to  
2 satisfy a personal vendetta or a grievance is, in fact, part  
3 of the enterprise. And that's -- I don't want to get into the  
4 facts of *Bruno*. Your Honor distinguish the facts of *Bruno* in  
5 the Basciano ruling.

6 But just as a matter -- is that language proper in  
7 a RICO indictment? I think that is a more narrow issue that  
8 is ripe at this time before the Court. And -- and I -- and  
9 I would ask Your Honor to take a look at that -- at that  
10 issue.

11 I understand the Court's rulings in the past that  
12 there is a need for a full evidentiary record on this issue  
13 typically, and -- and frankly, part of my motion that I filed  
14 was for purposes of preserving issues that have already been  
15 decided adversely to me by the Second Circuit. And I am not  
16 going to suggest that Your Honor has a basis to look at that  
17 issue at this time.

18 I -- the only other motion that I filed that I would  
19 reference at this time is I did file a motion for additional  
20 peremptory challenges.

21 THE COURT: I have it.

22 MR. REEVE: Frankly, I think -- and obviously  
23 I don't want to presume what the Court might want to do,  
24 but it's always been my experience that the exercise of  
25 peremptories is not the part of jury selection which takes

1 an inordinate amount of time. If Your Honor wanted to defer  
2 that until we see how many jurors we actually have that are  
3 not either out by agreement, stricken by cause, we then have a  
4 pool and we can make that determination. The Government says,  
5 "Well, there is really no basis."

6 I think the reality here is we have four defendants  
7 who are charged with life -- potential life imprisonment  
8 without parole. There are likely to be inconsistent defenses  
9 in various permutations. And I -- and I think that it's  
10 appropriate. It's obviously a discretionary decision by Your  
11 Honor. I think the parties agree. Whether or not Your Honor  
12 has to decide that right now I defer to the Court on that.

13 Thank you.

14 THE COURT: All right. Thank you very much.

15 Mr. Goldberg.

16 MR. GOLDBERG: Very briefly, Judge, on the matter of  
17 the peremptories, and then I will turn it over to Ms. Merkl to  
18 handle those other arguments.

19 We rely on our papers on the request for additional  
20 peremptories, but I would note that I think it would be  
21 something Your Honor would need to decide before we bring in  
22 the pool because it might require a larger pool.

23 That's all.

24 THE COURT: How many do you think I need to bring in  
25 under the current circumstance?

1 MR. GOLDBERG: Based on what we have done in prior  
2 trials, I would say at least 300.

3 THE COURT: Anybody have a different number?  
4 Okay. Ms. Merkl.

5 MS. MERKL: Thank you, Your Honor.  
6 Good afternoon.

7 THE COURT: Good afternoon.

8 MS. MERKL: Starting first with the motions to  
9 dismiss, Your Honor, as to both the motion made by  
10 Mr. Indelicato and the motion made by Mr. Donato, the  
11 Government's position is that the motions are premature. They  
12 both touched on evidentiary sufficiency as to the allegations  
13 contained in the indictment, and it would be inappropriate  
14 for -- that Your Honor to consider the sufficiency of the  
15 evidence at this stage.

16 THE COURT: Well, assuming that the -- that it  
17 is proven or it could be proven that a murder took place to  
18 solve personal grievances and vendettas, the language that's  
19 just been recalled here, how could that be part of a  
20 RICO count --

21 MS. MERKL: Well, Your Honor, will respect to  
22 that --

23 THE COURT: -- as opposed to just a simple,  
24 straightforward conspiracy to murder or -- or some other  
25 form of murder that might not even be a federal case?



1 MS. MERKL: If the evidence, in fact, showed that  
2 there was no relatedness to the affairs of the enterprise, it  
3 would be properly dismissed at the end of the presentation of  
4 the evidence.

5 However, as the Second Circuit held -- has held in  
6 numerous cases, including the *Ty* case, relatedness can be  
7 proven by establishing either the commission of a particular  
8 racketeering act related to the activities of the enterprise  
9 or that the defendant was able to commit the particular act  
10 due to their position within the enterprise. And it is on  
11 this latter prong that we rest the argument that use of  
12 resources of the enterprise is sufficient to establish  
13 relatedness, both vertically and horizontally under RICO.

14 THE COURT: Do you believe you will be able to  
15 demonstrate that in presenting the case?

16 MS. MERKL: Absolutely.

17 And I would note that as both defense counsel  
18 conceded that Your Honor has already found such findings with  
19 respect to the Santoro murder in the context of the Basciano  
20 trial.

21 So with respect to the --

22 THE COURT: That was always with respect to  
23 Mr. Basciano.

24 MS. MERKL: Absolutely, Judge.

25 But with respect to the --

1           THE COURT: And there may have been -- may be a  
2 greater nexus of relationship of the murder to the activities  
3 of the enterprise, if they exist at all. If you are dealing  
4 with someone who is either that way, who is a principal in  
5 the enterprise, as opposed to someone who is brought in,  
6 you know, on a pretense -- on a -- based upon an explanation  
7 that my son -- you know, this guy is trying to kill my kid; so  
8 I've got to deal with him.

9           MS. MERKL: There -- there is an argument to be made  
10 in that regard but I think the flip argument -- the flip side  
11 of the argument can also be made, which is that Mr. Basciano's  
12 motive, assuming just arguendo that it was personal in nature,  
13 could be ascribed as a personal motivation, a personal thing;  
14 however, with respect to the -- his cohorts within the family  
15 or within the enterprise, what is their motivation? And that  
16 is really a question for the jury.

17           If their motivation was to please Mr. Basciano or to  
18 enhance the relationship with Basciano or to prove themselves  
19 to other members of the family by assisting Basciano with  
20 crimes of violence, all of which are fact questions, that  
21 determination needs to be left to the jury.

22           So, with respect to this -- Mr. Indelicato's motion  
23 I won't belabor the point further, and, you know, just you  
24 know, rely on a motion.

25           But there is one comment Mr. Sercarz has mentioned

1 that I wanted to address.

2 And he recommends that -- that this is, you know,  
3 racketeering in aid of murder and not murder in aid of  
4 racketeering. And I think that places undue reliance on this  
5 sort of colloquial title of this statute. The purpose that  
6 the Government needs to prove here is not -- you know, under  
7 1959, just to be clear, not speaking out the RICO Count, but  
8 if Mr. Donato motions to dismiss Counts 6 through 8, the  
9 Government has to prove that the defendant's purpose, or one  
10 of their purposes was for gaining entrance to or maintain or  
11 increasing a position in an enterprise engaged in racketeering  
12 activities.

13 And Mr. Sercarz's argument seems to conflate the  
14 notions of relatedness for RICO purposes and the expressed  
15 intent requirement set forth in 1959. And the Government  
16 fully expects to establish at trial that Mr. Donato and  
17 Mr. Indelicato both were motivated by their desire to assist  
18 Mr. Basciano, an individual who was of stature and of growing  
19 importance within the Bonanno family and also to, in  
20 Mr. Donato's, case assist in his own entry into the family.

21 Turning now, unless Your Honor has further questions  
22 on the motions to dismiss, to the arguments made as to the  
23 expert disclosures pertaining to John Carillo, the Government  
24 has no objection to the defendant's seeking to file a tailored  
25 motion in limine. As the Government has set forth in our

1 papers and has -- as we've have done in prior trials,  
2 Carillo's expected testimony will be focused on explaining  
3 the history, general structure, and methods of the La Cosa  
4 Nostra family and the particular history of the Bonanno family  
5 and the identity and rank of various individuals within the  
6 family and, you know, that we expect to have it be limited and  
7 we have no objection to, you know, their filing a motion and  
8 we will respond appropriately at that time.

9 THE COURT: All right. That seems reasonable  
10 enough. Everyone is in agreement. And it means that when we  
11 file we will have a more focused motion and we can have a  
12 discussion at that point. So I will hold off on -- on --  
13 I take it the -- in effect the motion -- that motion is  
14 withdrawn and will be renewed in -- in a more definitive  
15 detailed way closer to the trial.

16 Is that basically it, Mr. Sercarz?

17 MR. SERCARZ: Yes.

18 THE COURT: That's fine.

19 MS. MERKL: I'll turn it back over to defense  
20 counsel, Your Honor.

21 THE COURT: Okay. Very good.

22 Mr. Mitchell.

23 MR. MITCHELL: Good afternoon, Judge.

24 THE COURT: Good afternoon to you.

25 MR. MITCHELL: If the Court please, I would like to

1 discuss for a moment the motion that was made on behalf of  
2 Mr. Mancuso seeking severance under Rule 8(a) and 8(b) as an  
3 initial observation.

4 THE COURT: Is there any case law that -- in this  
5 Circuit that would require it?

6 MR. MITCHELL: That would require the severance?

7 THE COURT: Yes.

8 MR. MITCHELL: Well, I think so, Your Honor.

9 THE COURT: And what statute?

10 MR. MITCHELL: Well, 8(b) -- as I was going to say  
11 as an introductory remark, we have challenged both the  
12 severance on the basis of the counts and on the defendants,  
13 and it appears to be the position of the Second Circuit that  
14 the test that is established under 8(b) is the one that  
15 applies in -- in these mixed circumstances.

16 Under 8(b), which is a statute that requires  
17 severance as a matter of law, the Government at some points in  
18 their memorandum argues about relative prejudice. But the  
19 issue here is whether or not the counts are properly joined  
20 and the defendants are properly joined as a matter of law.

21 If Your Honor looks at the -- at the indictment, the  
22 test that has to be applied is whether or not the three counts  
23 that Mr. Mancuso is charged in -- and the -- and the  
24 indictment is somewhat unusual in the sense that the first two  
25 counts, as -- as we typically see in RICO indictments, are

1 normally charged in 1962(c) substantive count and a 1962(d)  
2 RICO conspiracy count.

3 In this case Mr. Mancuso is not charged in any  
4 way in either Count 1 or Count 2. He is not charged in  
5 participating in either the substantive RICO count or the RICO  
6 Conspiracy count, and, of course, he is not charged in any of  
7 the predicate acts that are enumerated as part of the pattern.  
8 He is charged only in three counts, Your Honor, and those are  
9 the three counts: Two 1959 counts, I think it's Counts 2 and  
10 3; and then a count alleging the use of a weapon in connection  
11 with a crime of violence.

12 If Your Honor applies the Rule 8(b) standard  
13 which -- which is that in order for joinder to be proffered  
14 there must be a finding that the acts that the defendant is  
15 charged with were part of the same act or transaction or  
16 series of acts or transactions that the other individuals  
17 are charged with, I don't know how someone could reach that  
18 conclusion because if you go on to examine the other counts  
19 in the indictment -- as I said, he is not charged in Count 1  
20 or 2.

21 If you go on and look at the other indictment,  
22 there's another series of 1959 counts involving the alleged  
23 murder of DeFilippo. There is another allegation of murder  
24 involving Santoro, none of which it's alleged that Mr. Mancuso  
25 is criminally liable for or participated in any way.

1           And then the indictment goes on in counts -- I  
2 think it's -- I am not sure what the number of the count is,  
3 but there's an individual account that charges Mr. Aiello  
4 alone with assault in aid of racketeering.

5           And then Counts 11 through 16 charged extortionate  
6 extensions of credit by Mr. Aiello. And then, finally, the  
7 last count charged on Mr. Aiello -- and Mr. Basciano was  
8 obviously already been severed with participating in a  
9 gambling enterprise in violation of Section 1955. It is hard  
10 to imagine how it can be said that these completely unrelated  
11 acts are somehow part of the same series of transactions.

12           The Government cites the *Savonne* case in support  
13 of their contention that joinder is proper here. But I think  
14 they really ask too much. In -- as an initial observation,  
15 the Second Circuit observed in *Savonne* that the -- that the  
16 connection was tenuous at best. But more than that, they  
17 allowed sever- -- or they allowed joinder there because they  
18 found that the counts that Mr. Savonne was charged with was  
19 really tied to the whole underlying thesis of the indictment,  
20 which was labor racketeering. You don't have that in this  
21 case.

22           In fact, in a recent decision -- well, not so  
23 recently. But in a decision, *United States versus Selemey*  
24 which is not cited in our brief -- but it's recorded at  
25 152 F.3d 88 at 115; it was decided by the Second Circuit in

1 1998 -- they described the nature of the prejudice which  
2 evolves in an instance where there is misjoinder under 8(b).  
3 And what they say -- and I am quoting the decision now.

4 They say that prejudice occurs in joint trials when  
5 proof inadmissible against the defendant becomes a part of the  
6 trial solely due to the presence of codefendants as to whom  
7 its admission is proper. And that is precisely what Your  
8 Honor is going to have -- is going to face in this case if  
9 there is not severance.

10 Every time that there is a piece of testimony or a  
11 document or some evidence offered with respect to any of these  
12 other counts, including the RICO Counts, we're going to be  
13 asking for limiting instructions.

14 THE COURT: It happens all the time.

15 MR. MITCHELL: Well, it may happen all of the time,  
16 but -- but --

17 THE COURT: Isn't there a connection in Counts 3  
18 and 4 which have to do with Aiello and Mancuso's alleged  
19 participation in the Pizzolo murder? Why should they be  
20 severed in that situation?

21 MR. MITCHELL: Well, those counts can be together,  
22 but -- but there's no --

23 THE COURT: So you're saying that Mr. Aiello should  
24 be -- should be tried twice?

25 MR. MITCHELL: Well, I'm simply I -- I wouldn't put



1 it --

2 THE COURT: In other words, once on the racketeering  
3 counts and conspiracy, RICO, and then -- but then there should  
4 be a separate trial as to the Pizzolo murder as for -- because  
5 Mr. Mancuso and Mr. Aiello were together allegedly in  
6 committing that.

7 MR. MITCHELL: Well --

8 THE COURT: How would we do that?

9 MR. MITCHELL: -- that might be the consequence.

10 What I'm here to do is to argue that Mr. Mancuso  
11 should not sit through a trial. I wish all of this highly  
12 prejudicial proof is going to come out about issues and cases  
13 and matters that he has nothing to do with. I mean, that is  
14 fundamentally what 8(b) is all about. It's to prevent that  
15 sort of prejudice If -- if he's -- if his crimes are not part  
16 of the same active transaction; for example, what is the  
17 relationship between the alleged Pizzolo murder and these  
18 extortions in collections and credit, or gambling conspiracy  
19 or an assault of someone? There's absolutely no relationship  
20 to those.

21 And as I say, I am not here to argue anything about  
22 Mr. Aiello. I am simply here to argue that my client, under  
23 8(b) as matter of law, is entitled to a severance because  
24 there is no basis to join those counts with the -- with the  
25 other counts. They are simply not part of the same act or

1 transaction.

2 And I would simply, perhaps, wind up my argument  
3 by -- by bringing to the Court's attention -- it's a matter --  
4 it's a case that's cited in our brief for a southern district  
5 decision by Judge Cedarbaum where the Government argued that  
6 the membership of the various individuals in the same  
7 enterprise was sufficient glue to satisfy the 8(b)  
8 requirements. And the Court wrote that on the face of the  
9 indictment the only common thread between the two sets of  
10 defendants is that both are charged with criminal conduct  
11 allegedly committed in connection with the almighty Latin  
12 King/Queen nation, the Latin Kings.

13 This connection does not transform the disparate  
14 criminal conduct into the same act or transaction or series of  
15 acts or transactions. If this connection were sufficient to  
16 meet Rule 8(b) standard, all members of Latin Kings who  
17 committed crimes could be joined in a single indictment.

18 As I said, Your Honor, the -- the analysis proceeds  
19 not from what the Government suggests that it may prove, but  
20 from the face of the indictment. And looking at the face of  
21 the indictment, I don't believe that anywhere there is a basis  
22 to argue that these disparate criminal acts committed by other  
23 people with which my client is not charged or linked in any  
24 way could possibly be deemed to be part of the same series of  
25 acts or transactions.

1 Thank you, Judge.

2 THE COURT: Thank you, Mr. Mitchell.

3 Anyone else on that?

4 MR. SCHOEN: Your Honor, these issues are just so  
5 different. I thought that maybe --

6 MS. MERKL: Is there a problem?

7 Your Honor, what's your --

8 THE COURT: Is there really such a thin connection  
9 that we really should be -- we should be trying this case in  
10 two parts, one for Mr. Mancuso and the other one for everybody  
11 else?

12 MS. MERKL: The Government generally doesn't think  
13 so, Your Honor. And we would note that as an element of the  
14 1959 charges that Mr. Mancuso was charged in, the Government  
15 is required to prove the existence of the enterprise and the  
16 impact on commerce that the enterprise has.

17 And in that regard, the evidence that will be  
18 admitted at trial -- we anticipate presenting at trial for  
19 Your Honor's determination as to admission will prove the  
20 relatedness of the various predicate acts alleged in the  
21 racketeering counts to establish the existence of the Bonanno  
22 family and that evidence would be admissible in a separate  
23 trial because the Government has the burden of proof as to the  
24 enterprise and that enterprise's impact on commerce as part  
25 of the 1959 counts in which Mancuso is tried -- charged.

1 Excuse me.

2 So in that regard, the Government feels that there's  
3 no basis for severances.

4 And we would note that Mr. Mitchell failed to  
5 address the Second Circuit's analysis in *Savonne* and Judge  
6 Sifton's analysis in *Rostelli* which is right on point,  
7 which -- in which -- in the *Rostelli* case Judge Sifton  
8 concluded that when predicate acts are included in a  
9 racketeering count and it's -- or properly indicted as part of  
10 a pattern for purposes of racketeering, Rule 8(b) cannot  
11 require a closer relationship to establish that these events  
12 are connected as a series of actual transactions for the  
13 purposes of Rule 8.

14 And we, you know, rest on our papers but certainly  
15 urge the Court to deny Mancuso's motion for severance.

16 THE COURT: Thank you.

17 MR. MITCHELL: Judge, may I just respond briefly?

18 THE COURT: Of course.

19 MR. MITCHELL: I don't understand the argument that  
20 was just made. He is not charged.

21 THE COURT: It is not your job to understand it.  
22 I have to understand it.

23 Go ahead. I understand. That's a term of art.

24 Please continue.

25 MR. MITCHELL: Not very well put.

1           This is not a case where I am arguing that there is  
2   disparate criminal contact -- conduct within the pattern of  
3   racketeering activity. He is not charged in the RICO count.  
4   He is not charged with any racketeering act. And the fact  
5   that the Government has to prove the existence of the  
6   enterprise, fine. If you prove the existence of the Bonanno  
7   family in order to prove the RICO count and you prove the  
8   existence of the Bonanno family in order to prove the 1959  
9   Count, it doesn't somehow relate that conduct, that is to say,  
10   the purported murder of Pizzolo, to gambling activities or to  
11   the collection of credit activities.

12           And that is the reason I cited Judge Cedarbaum's  
13   decision. I mean, the mere fact that they may be alleged to  
14   be members of the same association is not sufficient glue to  
15   hold it together. And these arguments about predicate acts,  
16   they have nothing to do with my client. He is not charged in  
17   the RICO counts.

18           And with respect to commerce, I mean the Government  
19   has to prove a nexus of commerce in every federal case there  
20   is. And the fact that it is somehow related to commerce is  
21   not sufficient glue to say that you could charge disparate  
22   criminal conduct, which it may also somehow be related to  
23   conducts, which I'm disinclined.

24           MS. MERKL: Your Honor, we are certainly not relying  
25   on the argument that the defendants are charged as being in

1 the same enterprise. We are not relying on the alleged  
2 membership of these defendants in the Bonanno family. We are  
3 relying on the fact that the substantive counts in  
4 which Mancuso is charged are also charged as predicate acts  
5 in the RICO count.

6 And on the face of the indictment -- and  
7 Mr. Mitchell is correct, Your Honor, is to look at the face  
8 of the indictment -- that fact that those substantive counts  
9 are part of the pattern of racketeering activity alleged in  
10 the RICO established that they are sufficiently related for  
11 the purposes of their Rule 8.

12 We rest on our papers.

13 MR. MITCHELL: Your Honor, they're not charged as  
14 predicate acts. I mean, if you look at the predicate acts,  
15 I would like to see somebody show me Mr. Mancuso's name  
16 because he's not charged in a single predicate act.

17 MS. MERKL: I think Your Honor gets our point, which  
18 it is the conduct charged as part of the predicate act, not  
19 Mr. Mancuso's name.

20 MR. MITCHELL: The point, Your Honor -- and I'm  
21 sorry to belabor the point.

22 But understanding RICO, I could participate in a  
23 predicate act with someone who was a racketeer, and I might  
24 not be guilty of racketeering. I could commit, for example,  
25 one predicate act with someone, and I wouldn't be guilty of

1 racketeering. And the fact that that person and I, the  
2 racketeer, the person who was guilty of racketeering and me,  
3 as codefendant who participated in the single act, that  
4 doesn't join me with every other disparate predicate act that  
5 exists in that pattern.

6 THE COURT: But there is no obligation under any  
7 case law that I know that there must be a -- an identity  
8 as to every act between the person who is only charged with  
9 the -- with a crime as opposed to participation in the  
10 racketeering conspiracy.

11 MR. MITCHELL: Well, in other words, it would be --

12 THE COURT: It would have to be -- you don't have to  
13 have a complete overlay of all of the facts, even though your  
14 client is not charged in the racketeering count and is only  
15 charged with the substantive act of murder.

16 MR. MITCHELL: Well -- well, all that I am saying is  
17 that the fact that disparate acts can be included under the  
18 umbrella of the pattern doesn't have any force with respect to  
19 someone who is not charged with the racketeering and who may  
20 or may not have been involved in one of the criminal acts that  
21 gives rise to a predicate. That doesn't glue him together now  
22 for everything else in the indictment.

23 THE COURT: Don't you have a much stronger argument  
24 if your client is only charged with some minor -- relatively  
25 minor crime having nothing to do with the major acts charged

1 in the racketeering counts as opposed to if the crime of  
2 murder, which other people are charged with as part of a  
3 racketeering conspiracy?

4 MR. MITCHELL: I -- I -- personally, I don't think  
5 the seriousness of the crime is the test.

6 The question is does that crime -- whatever it is,  
7 however serious or less serious it is -- relate to the other  
8 activities? Is it part of the same act- -- or transaction or  
9 series of transactions, such as the gambling or the extortion  
10 extensions of credit or the assault of some other person that  
11 he's got nothing to do with, and they are not claiming?

12 I mean, if, you know, they had charged him in the  
13 RICO count that -- then we wouldn't be here arguing. That --  
14 there must be a reason why he is not charged in the  
15 RICO count. There must be a reason why the Government elected  
16 not to say that he participated in those pattern of  
17 racketeering activities. There must be a reason for that, and  
18 I think that supports our argument that by simply charging him  
19 alone in three substantive crimes, you've got to relate those  
20 substantive crimes through the -- to the other substantive  
21 crimes and --

22 THE COURT: I understand your point.

23 MS. MERKL: Your Honor, do you have a question for  
24 me?

25 THE COURT: No. I am wondering, you know, if --



1 MS. MERKL: Well, Your Honor, I would --

2 THE COURT: -- if you can --

3 MS. MERKL: -- I would just note that with respect  
4 to --

5 THE COURT: -- add something that would enlighten  
6 us.

7 MS. MERKL: -- with respect to the argument as to,  
8 you know, a disparate act being related to the racketeering  
9 counts when somebody is not charged in the racketeering  
10 counts, the Government will point to the *Savonne* case where  
11 the Second Circuit squarely held that individuals can be  
12 joined for will aid purposes, even when not part of the  
13 substantive RICO.

14 And you know, the notion that this murder was not  
15 related to the affairs of the Bonanno family and related as  
16 a result to the remaining racketeering acts as charged in the  
17 RICO is -- is just not credible, and it's not factually  
18 accurate.

19 With regard to the absence of additional charges,  
20 the Government would simply respond that the -- the Court is  
21 to look at the face of the indictment, not to draw inferences  
22 as to the absence of charges in determining whether there's  
23 relatedness but to focus on the charges in the indictment as  
24 returned by the Grand Jury.

25 MR. MITCHELL: Two quick points, Your Honor.

1           *Savonne*. The reason -- the reasoning in *Savonne*,  
2       which I addressed in my initial presentation -- the reasoning  
3       of *Savonne* is that the *Savonne* substantive count related to  
4       the under- -- the entire underlying conduct that permeated the  
5       indictment, which was laid to racketeering. But the Court,  
6       itself, made the observation that the connection was very  
7       tenuous.

8           And with respect to looking at the indictment, I  
9       agree with Government counsel. There's nothing -- if you look  
10      at the indictment, there's nothing that would let you point to  
11      this or that paragraph and say, oh, well that's a -- that's a  
12      basis to say that the -- the alleged gambling enterprise or  
13      the alleged collection of extortion in credit transactions  
14      somehow is part of the same active transaction of the Pizzolo  
15      murder.

16           There is nothing like that.

17           THE COURT: Thank you.

18           MR. MITCHELL: Thank you.

19           MS. MERKL: Your Honor, we have nothing further  
20      unless you have something.

21           THE COURT: All right. Next issue.

22           MR. SCHOEN: Judge, I'm hoping that -- that the  
23      Court's familiarity with the tenets would rule that whoever  
24      gets the ball to the net last wins the point, and I think we  
25      got the last word in at that point.

1 THE COURT: Yeah.

2 MR. SCHÖEN: Things that --

3 THE COURT: I have actually never heard that  
4 analogy, and I hope I never hear it again.

5 MR. SCHÖEN: Things had been so conciliatory before  
6 Mr. Mitchell got up. I am going to have to apologize for  
7 calling his argument; that seems to have changed now.

8 Judge, I know that the Court has read all of the  
9 papers. I know you take the process seriously. So I really  
10 just want to cut to the chase.

11 I think has been a key issue -- not I think. It has  
12 been a key issue in this case, at least since last fall. And  
13 that is the -- what I call the discovery on the Cicale phony  
14 murder plot. That is really what I want to focus my attention  
15 on today in my part of the argument. In other words, we rely  
16 on the papers, and, in fact, with that -- for that we rely on  
17 the papers also but not exclusively.

18 Judge, I feel like we should step back to  
19 February 14th of this year when we -- with different players,  
20 and Mr. Buretta was standing here for the Government. And we  
21 made the point as strongly as we could that time was passing  
22 quickly and that the time for the Cicale documents and  
23 information regarding this phony murder plot to see the light  
24 of day had long passed, but in any event, it was upon us.

25 And the Court agreed, and the Court said to the

1 Government at the time -- in effect, recalling its earlier  
2 order granting the continuance of this protective order, the  
3 Court said in that order in December of 2007, December 19th,  
4 I believe, we are certain that the Government will conclude  
5 its investigation and report the invest- -- it's investigation  
6 of they matter to the Court and to defense counsel promptly.

7 And on that day, on February 14th when we would hear  
8 Mr. Buretta's position, and the Government's position  
9 continues to be in the papers and in response to the papers,  
10 and Mr. Basciano's case is, well, we have given them all that  
11 we need to give them.

12 And the Court told the Government something like --  
13 on February 14th something like, well, do more than that and  
14 do better than that because the Court took its responsibility  
15 very seriously.

16 Since February 14th, with respect to this Cicale  
17 phony murder plot issue, we haven't even gotten as much as the  
18 collective sweat off of the Government's brow with respect to  
19 this issue. We have nothing still. We have no witness  
20 identities that we sought consistently and repeatedly since  
21 this issue first surfaced, and I would remind the Court it  
22 only surfaced to us by happenstance, frankly, which, again,  
23 the Court took seriously and took action to try to remedy  
24 after we pointed out to the Court how we had been prejudiced  
25 by the -- I will call it the concealment, but the filing under

1 seal of certain documents.

2 So the Court left nothing to chance about that  
3 anymore. And the Court entered an order that said, I don't  
4 want anything filed under seal regarding this issue anymore.

5 That didn't have the intended impact because the  
6 Government has continued to file documents under seal with  
7 respect to that issue.

8 I mean, I have cut ahead in this argument to point  
9 out to the Court, as I do in the motion -- as we do in the  
10 motion papers. The very real danger of that is a practical  
11 and a very important Constitutional one; that is -- and I say  
12 that -- the continued filing under seal of documents, this  
13 Court spoke to that directly in Mr. Basciano's case and told  
14 the Government the Court simply would not have that anymore  
15 because it puts the Court in an untenable position.

16 As we say in our motion papers here and in the rely  
17 again, by asking the Court to deny us further discovery and to  
18 suggest that the -- and to conclude that the Government has  
19 fulfilled its disclosure obligations based on sealed documents  
20 puts the Court in the position that the Government stood in  
21 with respect to its *Napue*, N-a-p-u-e, obligations, the  
22 obligations under *Wallach*.

23 And those obligations, of course, as the Court  
24 knows, are to not permit any witness to testify falsely on the  
25 stand. And in this case and in any case which there is reason

1 to believe that could be a circumstance, to prevent ahead of  
2 time that witness from testifying falsely.

3 The Government's conduct with respect to the sealed  
4 documents has put the Court in the position because the Court  
5 has an independent obligation, of course, to maintain and  
6 insure the integrity of the process and of everything that  
7 comes from the witness stand, especially from the Government's  
8 side, the Court --

9 THE COURT: Everybody's side.

10 MR. SCHOEN: The Government has a special role in  
11 this process. It's the Government making the allegations.  
12 And I know the Court wants to insure the integrity of that  
13 process, but the Court can't possibly know the entire facts --  
14 all of the facts in the case, the entire defense theory of the  
15 case, the defense theory of cross-examination in the case, and  
16 these are decisions that are going to be relevant at the very  
17 time that the witness is testifying up there.

18 And so let's give a perspective on where we are on  
19 the Cicale thing. In my view, Mr. -- I use the vehicle of  
20 Mr. Mancuso's case, first because he is our client; but,  
21 secondly, it is because I think if we focus on him with  
22 respect to Cicale and this information, I think it applies to  
23 all of the defendants. If we focus on him, it is most clear,  
24 it seems to me, to crystallize the issue.

25 This is -- as to Mr. Mancuso, notwithstanding the

1 Government put in its responsive papers without any other  
2 reference, this is a single-witness case as to Mr. Mancuso.  
3 The case starts and stops with Cicale.

4 That certainly distinguishes the case, with all due  
5 respect to them, from the Basciano case and the Court's post  
6 trial motions order in the Basciano regarding this issue. And  
7 whether or not it distinguished it, even in that order the  
8 Court appropriately invited pretrial motions on this issue,  
9 understanding that that would put -- the defendant stands in a  
10 different procedure and substantive posture at that point.

11 But it is a single-witness case. I have said this  
12 from the first day I appeared in this case. I said it today.  
13 I will always say it.

14 The case as to Mr. Mancuso starts and stops with a  
15 claim by this Cicale about a conversation that naturally he  
16 had alone with Mr. Mancuso. And as the Court knows from have  
17 heard testimony in the Basciano cases, Cicale, who had this  
18 purported conversation with Mr. Mancuso hated Mr. Mancuso,  
19 sought permission to kill Mr. Mancuso, set about plotting to  
20 kill Mr. Mancuso, enlisted others to help him kill  
21 Mr. Mancuso.

22 The person the Court is asked to rely on now about  
23 this private conversation he had in which purportedly  
24 Mr. Mancuso because, oh -- in words and in effect, "You know  
25 Vinnie told you to do. You ought to do that."

1           The sum and substance of the entire case as to the  
2 Pizzolo murder with respect to Mr. Mancuso, period, start and  
3 finish.

4           That is why this guy, Cicale, is the key here, and  
5 that's why everything that has to do with his credibility is  
6 absolutely vitally important.

7           We're asked -- the Court is asked and the jury will  
8 be asked to convict a man of a crime that holds a life  
9 sentence here based on the word of Cicale and that one  
10 incident. That is a shocking proposition, given what we  
11 now -- what we knew earlier about Mr. Cicale, frankly, but  
12 what we now have strong reason to believe as to Mr. Cicale.

13           We have -- again, to crystallize the issue, there is  
14 no speculation with respect to this issue. What we have is --  
15 this is part of the overview -- credible evidence from a  
16 witness the Government has vouched for repeatedly, who has  
17 testified for the Government in cases in this district  
18 repeatedly, including a death penalty case, and very  
19 recently -- and I am not using the names and so on because of  
20 this whole protective order issue still, but the Court is  
21 aware of all of these facts.

22           Evidence comes from that credible witness, according  
23 to the Government -- and, by the way, we know they have also  
24 written letters vouching for that credibility and his value to  
25 the Government. The Court is aware of that also.



1           The credible evidence from that witness that Cicale  
2       concocted a phony murder plot in the prison -- and I don't  
3       have to detail all of the facts. The Court is familiar with  
4       those facts. But the point of it is there is no speculation  
5       here.

6           Once we reach that threshold that we have credible  
7       evidence to believe that Cicale engaged in this phony murder  
8       plot, we need not be satisfied -- there is no one in this  
9       process who should be satisfied with the Government's  
10      assertion in the letter -- I think it was February 15th of  
11      this year -- Cicale denies the allegations. That is just not  
12      sufficient. That is not sufficient to fulfill the  
13      Government's obligations, and it certainly doesn't stop our  
14      right and ability to investigate. But we don't have the  
15      ability to investigate in any kind of meaningful way because  
16      we have no access to the witnesses. We have no access to the  
17      document. We have been given a handful of selected documents  
18      that were submitted to the Court and to us, and those include  
19      the correctional officer -- correctional officer's affidavit.

20           But that only tells us we have to look further; that  
21      there really is something here that went on.

22           Again, I have laid out for the Court in the motion  
23      papers each of the items that we seek, and those are only the  
24      ones we know about. Each of the items that we seek with  
25      respect to this Cicale phony murder plot and the kinds of

1 witnesses for whom we seek access, not just CW-1 or WI-1 or  
2 CW-2 or WI-2. By the way, we still don't even know how many  
3 people there are being referred to by these kinds of initials,  
4 let alone their identities.

5 And that troubled the Court when we were up here  
6 even in February. But we lay out in the motion papers all of  
7 those kinds of things.

8 But, again, to crystallize the issue, I mean, let's  
9 take something that to me has always struck me as one of the  
10 most beyond the pale type of documents or set of information,  
11 and that is this seven-page letter. We are told by a  
12 correctional officer in her affidavit that CW-1, the person  
13 who first busted Cicale on this phony murder plot -- that CW-1  
14 wrote a seven-page letter which we're told describes this  
15 incident.

16 Now, we have asked for that, and the Government has  
17 responded to Mr. Basciano's lawyers on that point that in an  
18 abundance of caution they submitted that document to the Court  
19 under seal. That runs beyond the pale. We have to have  
20 access to that document.

21 But most importantly, I think, we should have access  
22 to all of the investigative reports on this, the memoranda  
23 written by the correctional officers about this. We must have  
24 access to the witnesses.

25 And as I say in the motion papers, I think because

1 we have, for example, surprisingly offensive provision in the  
2 affidavits by the correctional officers, at the end that they  
3 were told not to discuss this issue with anyone else. I think  
4 that the time has come -- and I don't say that this  
5 U.S. Attorney's Office told them that. They don't say who  
6 told them that, but they say they were told that.

7 All of these things, the denial of access to these  
8 witnesses -- and it goes beyond, by the way, of course, CW-1  
9 and CW-2. We are told in Officer Santamaggio's second  
10 affidavit that many inmates in this Wit Seg Unit were  
11 approached by Cicale for the purposes of enlisting them in  
12 this phony murder plot, and they rejected him. The fact of  
13 the matter is, we ought to be entitled to interview all of  
14 those people because when Cicale gets up on the witness stand  
15 and denies the allegation, as we are told he does, the  
16 Government is going to argue to the Court, I'm pretty sure in  
17 further cross-examination on that and calling other witness --  
18 if not for the cross-examination, but calling witnesses about  
19 this incident ought to be barred as unduly collateral, and we  
20 will deal with that argument at the time.

21 But, clearly, Judge, given the Court's independent  
22 obligation under *Napue*, *Wallach*, and etcetera, let alone the  
23 Government's obligation, since we know that these things exist  
24 ahead of time, we don't wait until the time of trial to find  
25 out how strong is this credible evidence because remember, if

1 CW-1, the Government's star witness and these other -- in this  
2 other case on several occasion at trial, if CW-1 is adamant  
3 what happened and detailed in his rendition about what  
4 happened, well, then that puts the Court and everybody else on  
5 notice that maybe Cicale is not telling the truth in these  
6 denials. After all, he has got a great incentive to deny it.

7 Think of all of the areas of cross-examination that  
8 this incident gives rise to. Now, look, there was plenty to  
9 play with with Cicale beforehand. This guy is a bad  
10 character, a bad actor. There was a lot to cross-examine him  
11 on.

12 But this thing was like manna from heaven in a sense  
13 when we learned about this because it seems that there is no  
14 end to what this Cicale will do to pervert justice and to try  
15 to help himself. I mean, talk about greed. The guy already  
16 was designated as a witness with the Government and had an  
17 opportunity to help himself, but that wasn't enough. He has  
18 to now concoct a phony murder plot in the prison and target a  
19 guard on top of it?

20 But this information alone -- I mean, the Court can  
21 reel it off faster than I can and better than I can, but, you  
22 know, there is a breach of an agreement here. There is a  
23 willingness to breach an agreement. There is no consequence  
24 for breaching an agreement. There is the integrity of the  
25 act, investigation, which is crucial under *Kyles*. All of

1 these Constitutionally based decisions.

2           There is continuing lies and denying the thing. On  
3 and on and on. And then at the heart of it, and it really  
4 makes this whole underlying incident not collateral is what we  
5 are dealing with here, the entire fabrication of whole cloth  
6 of a murder plot and who was involved.

7           Well, that is one of the defense theories in this  
8 case, of course; that Cicale concocted whether or not --  
9 concocted his role in the murder plot, but most importantly to  
10 Mr. Mancuso, out of whole cloth he put a person into this  
11 murder plot that Cicale concocted, solely for purposes of  
12 hurting a person that he hated and wanted killed.

13           Well, here is Cicale again, if the incident is to be  
14 believed -- and we are told by CW-1 and others that there is  
15 reason to believe that the incident occurred -- that is what  
16 he is doing again. While he is in the Government's employ, he  
17 is concocting out of whole cloth a fabricated role for people  
18 in a murder.

19           Judge, I lay out in my thing, as I say, all of the  
20 different things. I mean, there is no point in my reading a  
21 list of 20 or 30 items. But again, the day is -- the hour is  
22 late as to all of this stuff. We need all of these things.  
23 This is not a close question on this one.

24           Thank you very much, sir.

25           THE COURT: Thank you.

1 Mr. Goldberg.

2 MR. GOLDBERG: Your Honor, that was powerful  
3 summation, but the question before the court is a  
4 straightforward one: Has the Government complied with its  
5 *Brady* obligations and its Rule 16 obligations.

6 We set forth in our papers how we have not only  
7 complied; we have gone above and beyond what the Court and the  
8 law requires.

9 With respect to *Brady*, it is clear that a defendant  
10 cannot use *Brady* as a tool to force the Government to  
11 investigate details -- evidentiary details that the defendant  
12 wants the Government to investigate. The Government has  
13 disclosed, and I know this is set forth in our papers but I  
14 think it is worth mentioning, the name of the inmate, we have  
15 described the statements that the inmate claims that Cicale  
16 made, we have provided in camera the statement from CW-1, we  
17 have provided the contact information for the inmate's  
18 attorney, we have provided the affidavits prepared by prison  
19 employees in relation to the alleged phony plot, and we have  
20 specifically responded to, point by point, the request by both  
21 Mr. Mancuso's attorney and Mr. Basciano's attorneys.

22 Simply put, we have nothing further to produce about  
23 the purported allegations.

24 Rule 16, as we have indicated in our papers,  
25 provides no further relief because the question is one of

1 materiality. And although it is in a slightly different  
2 context, Your Honor has already ruled on March 24 that these  
3 matters are not material because the defense is already aware  
4 of the basic contours of the allegations, and they could look  
5 into them.

6 With respect to this grand claim that Dominick  
7 Cicale is the end game with respect to Mr. Mancuso, we have  
8 indicated in our papers and Mr. Schoen fails to recognize it  
9 here that there is a recording that I'm sure Your Honor is  
10 fully familiar with where Vinnie Basciano identifies Michael  
11 Mancuso as the person who gives the final order to kill  
12 Randy Pizzolo.

13 Unless the Court has further questions, that is it.

14 Thank you.

15 THE COURT: Anything further?

16 MR. SCHOEN: Certainly after they have given  
17 point-by-point responses to our request, the response has  
18 been, for the most part, you don't get any more. Nice  
19 request, but sorry.

20 I'll say it again. Dominic Cicale is the starting  
21 and end point with respect to this entire case against  
22 Mr. Mancuso. I know Mr. Goldberg to be an honest guy. I know  
23 he is not intentionally misstating the record, but it's hardly  
24 at this point now -- I know the Government has taken offense  
25 in maybe the way I have done it, and maybe it was offensive.

1 THE COURT: Just --

2 MR. SCHÖEN: But anyway, anyone -- anyone who looks  
3 to -- anyone who looks at and listens to these tapes to which  
4 Mr. Goldberg refers would come to the exact opposite  
5 conclusion. It is not possible to fairly read the Basciano  
6 Massino tapes to come to the conclusion that Mr. Mancuso not  
7 only gave of the final order, even knew about the Cicale plan  
8 to kill Pizzolo. It's just not possible.

9 And, again, there are a million examples -- and that  
10 is an exaggeration. There are many examples in those tapes  
11 that prove the point.

12 But getting to the end, one of the, again, best  
13 illustrations of it is there is a discussion on the tapes  
14 about what is going on. Massino wants to know what is going  
15 on with Cicale out there and Mancuso. There is dissension on  
16 the streets and all that.

17 And Basciano tells him on that second tape that he  
18 thinks that Mancuso probably suspects that Cicale had Pizzolo  
19 killed; and, therefore, he is worried and he is scared that  
20 something like that could happen to him. That is not possible  
21 to reconcile with the idea that Mr. Mancuso ordered the hit,  
22 plus there are places on the tape when Basciano says, "I did  
23 it. This is just me," and all that. There are many, many  
24 examples in there. We can't take an isolated incident.

25 And they did it -- you know, we are going to get to



1 it, I am afraid, with the anonymous jury thing. They did it  
2 again there. It is completely out of context, and it is  
3 simply not a fair reading.

4 Again, that is not a close call. Rule 16 we do say  
5 provides an independent basis, and I have cited the exact rule  
6 that clearly this is material to preparing a defense. The  
7 whole defense in the case is cross-examination of Dominick  
8 Cicale.

9 THE COURT: All right. Thank you.

10 MR. SCHOEN: Thank you, Your Honor.

11 THE COURT: On the anonymous jury.

12 MR. SCHOEN: Can I just go first on that, Judge?  
13 Is there motion?

14 MR. GOLDBERG: If the Court has questions;  
15 otherwise, we'll rely on our papers.

16 MR. SCHOEN: I would like just a moment to get my  
17 notebook.

18 THE COURT: Sure.

19 MR. SCHOEN: I am the one who has to catch a plane;  
20 so I will make it brief, Your Honor.

21 THE COURT: I have a few things to say too.

22 MR. SCHOEN: All right.

23 THE COURT: Go ahead.

24 That should shorten your decision.

25 MR. SCHOEN: Yes, Your Honor. It does.

1 Judge, on the anonymous jury, I mean, the --  
2 unfortunately, as the Court is aware, I tend to be too wordy  
3 in the written submission; so I would like to cut to the chase  
4 here.

5 And that is the thrust of the Government's argument  
6 is this is an organized crime case; therefore, there should  
7 be -- that is the underlying thrust of the argument. This is  
8 an organized crime case; therefore, there should be an  
9 anonymous jury because organized defendants, after all, are  
10 dangerous, et cetera.

11 Now, the Court knows, and has written extensively --  
12 and the Government knows.

13 The Court has written extensively to this -- to this  
14 notion; that is that we cannot just grant an anonymous jury  
15 based on organized crime or allegations of organized crime  
16 membership. So what the Government has done in this case has  
17 reached and tried to fit in evidence that the believe or  
18 suggest to the Court fits into the various prongs.

19 Now, we took issue in our papers the Government's  
20 five-factor case. I had my three-factor Second Circuit case.  
21 What do I say? I mean, certainly the five-factor case -- the  
22 five factors the Government suggests resemble what the other  
23 Courts have used, and in a couple of cases in this district  
24 have actually been used by the Court.

25 So whichever we go with, I think -- what I have to

1 ask the Court -- and I may be, someone suggested, you know,  
2 running uphill on this because I know this is the trend in  
3 this district. But we always have to take a step back and  
4 remember the principles. And the underlying principles are it  
5 is a dramatically disfavored exception, only to be used when  
6 genuinely called for based on sufficiently -- a sufficient --  
7 sufficiently strong reason to believe that the jury would need  
8 protection. It is a drastic measure.

9           The bottom line -- we address each of the factors in  
10 this. The bottom line is as to Mr. Mancuso, my client, and  
11 that is all that I am raising here. And as I say in the  
12 papers, I don't want to step on anyone else's feet with  
13 respect to facts. Everyone joins in the motion. If anyone  
14 has separate submissions to make on the facts, I am open to  
15 them.

16           But the bottom line is there is absolutely no  
17 evidence in his history of the kinds of things that are  
18 appropriate considerations for an anonymous jury. That is no  
19 evidence of jury tampering or obstruction or willingness to  
20 interfere with the jury process. It is certainly not  
21 sufficient to justify this kind of drastic and disfavored  
22 exception.

23           And that is really what the *Blackshire* case in the  
24 Second Circuit says we focus on, and not all of these other  
25 kinds of things.

1           Again, I think, wordy or not, I address these in  
2 motion papers.

3           THE COURT: All right. Thank you.

4           MR. SCHOEN: Thank you.

5           THE COURT: Does anyone else want to speak to the  
6 issue on the defense side?

7           MR. SERCARZ: I would like to make an observation,  
8 Your Honor.

9           The way that the motion papers were presented to the  
10 Court, you were sort of given an either/or choice. You were  
11 given the choice not to consider an anonymous jury, to reject  
12 it here because the proof has not been made that it is  
13 appropriate here, and we all joined in that; or do we impose a  
14 certain set of remedies that we -- for which we use the  
15 shorthand of an anonymous jury.

16           By anonymity isn't the only remedy that is being  
17 proposed here. It is also being proposed that the jurors be  
18 transported by agents of law enforcement to a certain place  
19 away from the courthouse, meaning that the very first thing  
20 that happens to them in the morning and the last thing that  
21 happens to them at night is that their, quote, unquote, safety  
22 is being assured by being accompanied by law enforcement.

23           The observation is made that a neutral explanation  
24 dealing with jury privacy can be provided, but in the course  
25 of a six- or eight-week or ten-week trial, on a daily basis

1 that explanation is, to some degree, belied when there are  
2 days during the trial when the press does not appear or it  
3 turns out that the case gets less newspaper and media coverage  
4 than we anticipate and yet the marshals are transporting these  
5 the anonymous jurors day in and day out.

6 And, To me, it is strange credulity to believe that  
7 the jury is not going to infer from that that there is some  
8 concern about their safety.

9 You have heard the arguments as to whether or not  
10 the threshold has been met, but the Court has not heard any  
11 arguments about whether or not there are less intrusive  
12 alternatives than the ones that have customarily been used in  
13 this district to insure that the Court will have no concern  
14 about jury tampering, and yet which are more likely to afford  
15 these defendants the fair trial to which they are entitled  
16 which is free of prejudice.

17 I was not going to raise the issue of alternatives  
18 because it weakens the argument that the Government has not  
19 really met the threshold of requiring jury anonymity and all  
20 that goes with it. But I would like an opportunity, and if  
21 now is my only opportunity, I will speak to it.

22 But I would like the opportunity to propose in the  
23 event that this Court is going to find that some form of  
24 protection, in quotes, is necessary, that we have the  
25 opportunity to speak to the Court on a methodology that is

1 less intrusive to our clients's right over the course of a  
2 six- to eight-week trial. If the Court says now is the only  
3 time, I am ready to talk to you about that.

4 If the Court wishes to rule first on the issue of  
5 jury anonymity and the attendant factors but give us an  
6 opportunity to talk about other things, I would like to avail  
7 myself of that, if I may.

8 THE COURT: What is the -- what is the harm to the  
9 defense in jury anonymity to the extent that it has been  
10 proposed, wherein they are going to know a great deal about  
11 the individual members of the venire. You are not going to  
12 know their names, their addresses, or their phone numbers.  
13 You will know the neighborhood they live in, the county. You  
14 will know, you know, their ethnic background, their education,  
15 and various other elements of their background, but you just  
16 won't know certain rather specific identifying information.

17 MR. SERCARZ: A hypothetical. And maybe the  
18 Government would be the one who was prejudiced by this one.

19 The defendant says he works for a -- withdrawn.

20 The potential juror says he works for a construction  
21 company. We don't get his name. Unbeknownst to any of us,  
22 this construction company is a construction company which is  
23 allegedly infiltrated by organized crime.

24 Has somebody been deprived of a material piece of  
25 information?

1           The construction company is one that is allegedly  
2 under investigation because of ties to organized crime. The  
3 company has allegedly been the victim of an extortion by  
4 someone. Without the information regarding the individual's  
5 place of employment, including the name of that place of  
6 employment, a critical piece of information is lost that one  
7 side or another might use in order to render a challenge for  
8 cause.

9           And I am deliberately using an example where the  
10 Government is probably being deprived of salient information  
11 that they would use to exercise a challenge for cause, and I  
12 am doing it for a reason.

13           THE COURT: Right.

14           MR. SERCARZ: Whenever we -- okay.

15           THE COURT: There are ways of dealing with that in  
16 voir dire, as we do it all of the time, particularly in these  
17 more serious cases when there are individuals who are dealing  
18 in death penalty cases where we go into extensive questioning.  
19 Sometimes the questioning takes place by the Court without the  
20 parties present in order to elicit certain that maybe -- that  
21 the Court believes is -- may be found germane to the decision,  
22 and then that is related to the attorneys.

23           And the way I handle it, quite frankly, is if any of  
24 the attorneys believe that more information is needed in order  
25 to have a fulsome understanding of the background of the

1 potential juror, then we -- we fashioned a method of obtaining  
2 that information that will not have the outcome of disclosing  
3 the juror's name, address, and phone number. And it may just  
4 be in some cases that is not possible, but in most cases I  
5 think we have been very successful.

6           You know, I interviewed 269 prospective jurors in my  
7 death penalty trial individually. My sense is that we  
8 received a great deal of information about those potential  
9 jurors that was not disclosed in their questionnaires, and we  
10 followed it up on answers that didn't provide sufficient  
11 information so that the Court and the attorneys could make  
12 appropriate and informed decisions about whether to strike  
13 certain juror candidates.

14           I understand your point, but there are ways of  
15 dealing with that in an anonymous jury context.

16           I would be a little more interested in -- in knowing  
17 how you think we might resolve the question, should I think  
18 that it is -- some sort of protection is needed, physical  
19 protection of the jurors. How would we solve the problem with  
20 respect to the question of a semi-sequestered jury?

21           Do you have anything on that?

22           MR. SERCARZ: Yes.

23           The answer that I have always given is as follows,  
24 Your Honor.

25           In the annals of those cases in which jury tampering



1 has been found, it has, to my knowledge, always been the case  
2 that only one juror has been approached, and that that  
3 individual has been designated as a juror at the time that  
4 that individual has approached -- has been approached.

5 What I am about to suggest --

6 THE COURT: I am sorry. Has been designated by  
7 whom?

8 MR. SERCARZ: Let me -- let me get to the punch  
9 line, and you will see where I am going.

10 I proposed in other cases, Your Honor, as a less  
11 onerous method of jury selection and one that preserves more  
12 of the defendants's rights that rather than selection  
13 12 jurors and the requisite number of alternates, that you  
14 select 18 people at once, and that the decision is not made  
15 until the eve of jury deliberation as to which 12 are going to  
16 serve on the jury and which six or four or two are going to be  
17 the alternates.

18 It has the salutary effect of making sure that all  
19 of these people listen throughout the trial because every one  
20 of them is going to be serving on the jury, and there are  
21 cases where protection of some sort would be helpful or  
22 necessary, the threshold has been met, but that kind of a  
23 safeguard would be enough to insure that people are not  
24 approached for improper purpose.

25 THE COURT: Which 12 will I select?

1 MR. SERCARZ: It can be done by lot on the eve of  
2 deliberation. And from the time that the jury is selected and  
3 the alternates are discharged, then at that point measures can  
4 be taken during the deliberations to safeguard the sanctity of  
5 the jury's deliberation.

6 I would urge that instead of transporting people to  
7 a single place throughout the course of the trial, day in and  
8 day out, back and forth. Indeed, I feel that it is enough to  
9 overcome the need for anonymity in virtually all of the cases  
10 where an anonymous and impartially sequestered jury has been  
11 granted.

12 THE COURT: Okay. Mr. Schoen, do you have an idea  
13 too?

14 MR. SCHOEN: Yes, Your Honor.

15 I have to respond to one paragraph.

16 The Court asked the question a moment ago, what  
17 prejudice do we suffer really here, given that the Court's  
18 questioning, the intensity is exhaustive, et cetera. And the  
19 answer was the information base is kind of prejudiced. We may  
20 have a problem with getting information. That is, of course,  
21 one of the problems.

22 Frankly, I see I may be spitting in the wind here,  
23 but I have to do it because of the very serious proposition  
24 that each of us in this process has to take control of, and  
25 that is the whole idea of an anonymous jury. I know the Court

1 takes it seriously, but we as lawyers have to take it  
2 seriously also.

3 I am going to give you one paragraph on what  
4 prejudice is. And prejudice is much more direct than lack of  
5 information. It is what is put in the jurors's minds. I am  
6 going to quote from a guy here. I put it in my papers,  
7 Page 5. One of the most courageous judges in the South during  
8 the Civil Rights period in my book of unlikely heroes.

9 Frank Johnson wrote on this question when he granted  
10 it. This is my friend, and this is my mentor. I quote him  
11 for that reason, frankly, because I respect what he writes and  
12 says.

13 He said, "Unquestionably, the empanelment of an  
14 anonymous jury is a drastic measure, one that should be  
15 undertaken only in limited and carefully delineated  
16 circumstances."

17 We are all on the same page with that.

18 "An anonymous jury raises the specter that the  
19 defendant is a dangerous person from whom the jurors must be  
20 protected, thereby implicating the defendant's Constitutional  
21 right to a presumption of innocence, the enforcement of which  
22 lies the foundation of our administrative -- our administration  
23 of our -- the administration of our criminal law."

24 That is fundamentally where the prejudice comes in,  
25 besides you have an informational perspective. And I know

1 that the Court didn't mean it, but when we get into a  
2 discussion about, well, what prejudice would they suffer  
3 anyway because we ask a lot of questions, I appreciate the  
4 Court's intended thoroughness in asking those questions. I  
5 don't mean to not acknowledge that.

6 But it just doesn't -- the prejudice is there, and  
7 the alternative is root to the basis of a process that we are  
8 told has to be addressed, one, only in exceptional  
9 circumstances for a reason: Because it puts something in the  
10 minds of these jurors, and no juror can ignore it.

11 That is what I think is really the answer to what  
12 prejudice we suffer. As corny as it might sound, that is my  
13 view on it.

14 MR. GOLDBERG: Your Honor, three quick points.

15 First, the Second Circuit, by virtue of its  
16 decisions on anonymous juries, has acknowledged and -- that  
17 passage and gone in a different direction.

18 Second, Mr. Sercarz's suggestion about having 18 and  
19 then choosing 12 on the eve of trial rings a bell with me  
20 because I think he suggested it about years ago in a case --

21 MR. SERCARZ: I did.

22 MR. GOLDBERG: -- that we -- we faced each other,  
23 and the Judge declined to do that. And the reason is because  
24 although it may reduce the risk of tampering, it certainly  
25 doesn't eliminate it.

1           And, third, we can talk about what measures can be  
2 taken to reduce the prejudice -- the prejudice to the  
3 defendants of having marshals with them all day long, but one  
4 thing that comes to mind is -- is having Your Honor routinely  
5 instruct the jurors; again, remind them they should draw no  
6 inference for or against the defendants in light of that  
7 protection.

8           Thank you.

9           MR. SCHÖEN: Just to kind of close all this, I just  
10 want to say that -- I said that this seven-page letter may be  
11 the most clear example of something beyond the pale. I think  
12 there is something that is maybe more beyond the pale.

13           How about if we make -- the Court make the  
14 Government choose, at least, and disclose who is telling the  
15 truth between its witness in the other case who said  
16 unequivocally Cicale gave him this phony murder plot and  
17 enlisted other in it or Cicale.

18           If the other fellow is lying, what are the -- what  
19 are the consequences to him? They cannot both be telling the  
20 truth. That is 100 percent sure. Maybe that is a more basic  
21 request.

22           THE COURT: All right. Thank you.

23           MR. MITCHELL: I'm sorry. Just one -- one issue on  
24 the anonymous jury.

25           And that is that I don't believe -- and I might be

1 wrong, and the Government can correct me if I am wrong -- but  
2 Attorney Schoen represented that there is no allegation in the  
3 original allegations with respect to Mr. Mancuso of  
4 obstruction and tampering.

5 To my knowledge, based on the Government's pleading,  
6 to my knowledge in this case there are no allegations with  
7 respect to any of the four defendants who are scheduled to  
8 start trial before Your Honor.

9 And I want to complete the record. I understand  
10 that there are allegations against other alleged members of  
11 the family, but with respect to specific individualized  
12 allegations with reference to any of the defendants on trial  
13 here, I don't believe there are any. I can be corrected on  
14 that, but I don't believe the Government has so represented.

15 THE COURT: All right. Thank you.

16 MR. GOLDBERG: Your Honor, I need to correct  
17 something. I'm sorry.

18 One of the charges that the Pizzolo murder was an  
19 obstruction of justice.

20 THE COURT: Which murder?

21 MR. GOLDBERG: The Pizzolo murder.

22 We indicated in our papers that -- that Mr. Basciano  
23 indicated that Mr. Mancuso had told him that Randy Pizzolo was  
24 a rat, and so there is an allegation with respect to  
25 Defendants Aiello and Mancuso that there was obstruction in

1 this case. Your Honor is fully aware that the case law  
2 indicates that the defendants on trial do not need to have  
3 participated in any way in tampering for there to be an  
4 anonymous jury.

5 THE COURT: Yes.

6 MR. SCHOEN: I mean, you know, again, as you said,  
7 Judge, we addressed that in the papers. But, again, taking  
8 out of context, this case has been tried before the Court a  
9 couple of times, the Pizzolo murder. There was never a theory  
10 put forward that Pizzolo was killed because of the suspicion  
11 that he was a rat. That is simply not there to suggest that  
12 that is the case.

13 MR. GOLDBERG: The Pizzolo murder has not been  
14 tried.

15 MR. SCHOEN: I understand, but there have been  
16 allegations that --

17 THE COURT: I know.

18 But I thought you said that I had tried the Pizzolo  
19 murder, and so I don't know everything there is to know about  
20 the Government's purported facts on the Pizzolo murder.

21 MR. SCHOEN: I mean, I pointed out already that  
22 404(b) evidence on the Pizzolo murder has come in, the Court  
23 has had that before it. There is 3500 material from Cicale  
24 about it. There has never been put forward a theory that he  
25 was killed because he was a rat. And more than that, the same

1 tapes that he has drawn all of the excerpts from go on and on  
2 and on about how misguided that yahoo purportedly was for  
3 killing the guy because he was a jerk. Massino tells him, "We  
4 don't do things like that, kill a guy because he is a jerk or  
5 a braggart." Nobody said because he is a rat.

6 THE COURT: Anyone else?

7 MR. SERCARZ: Not on this point, but before we  
8 adjourn, may I have a moment with my client? I want to --  
9 there have been some logical issues regarding the receipt of  
10 materials, and I want to make sure --

11 THE COURT: All right.

12 MR. SERCARZ: -- there is nothing --

13 THE COURT: I am not done.

14 MR. SERCARZ: Okay.

15 THE COURT: So when I am done --

16 MR. SERCARZ: Thank you.

17 THE COURT: -- then you can meet with your client.

18 If there is something that you want to bring to the  
19 Court's attention --

20 MR. SERCARZ: There may be, but I'll wait.

21 THE COURT: Well, let's -- I am going to reserve on  
22 the motions. And I have one other item to discuss.

23 Now, Mr. Goldberg, about how long do you think that  
24 the Government's case is going to take, assuming we go ahead  
25 as is currently planned.



1 MR. GOLDBERG: I think once we start with opening  
2 statements, about six to eight weeks.

3 THE COURT: All right. All right. Thank you.

4 Now, this trial is anticipated to last at least six  
5 weeks, and the Court expects that the parties will call dozens  
6 of witnesses.

7 Is that a fair statement?

8 MR. GOLDBERG: It is, Your Honor.

9 THE COURT: Okay. In consideration of the frailty  
10 of human memory, the Court intends to institute a new  
11 procedure at trials exceeding two weeks in duration, one that  
12 is currently in practice in a number of courts around the  
13 nation. The Court plans to take photographs of testifying  
14 witnesses and allow the jury to use those photographs during  
15 deliberation as a demonstrative aid.

16 I want to emphasize at the outset, particularly  
17 since this would be the first time that this Court has used  
18 such a procedure, that any pictures taken will be strictly for  
19 the use of the jury only and not be disseminated to anyone  
20 else.

21 After a verdict is reached, photographs will be  
22 retrieved by the clerk of the court and destroyed. The Court  
23 is cognizant of the important potential safety concerns of  
24 cooperating witnesses and undercover officers and other  
25 sensitive witnesses and will carefully monitor the taking,

1 use, and disposal of such photographs.

2 With that said, the Court believes that it would be  
3 extremely useful in such a long trial for the jurors to be  
4 able to refresh their memories about witnesses's testimony.

5 The manual of complex litigation states that, quote,  
6 jurors understand better and understand more when information  
7 is presented both visually and verbally, end quote.

8 Being able to view these photographs is a corollary  
9 to the jurors's ability to take notes.

10 As I mentioned, this procedure has been employed by  
11 a number of district courts, and this Court has not been able  
12 to find any law in this Circuit that bars this Court from  
13 doing the same.

14 Note, *U.S. v Johnson*, 362 F.Supp.2d, Northern  
15 District of Iowa 2005. Finding that photographs of testifying  
16 witnesses qualifies as demonstrative exhibits and that, quote,  
17 showing the jurors photographs of witnesses at the end of the  
18 trial that is likely to last three months or more and likely  
19 to involve over 100 witnesses would be an effective way to  
20 refresh the jurors's memories as to the testimony of  
21 particular witnesses, end quote.

22 Specifically, the Court will employ the procedure  
23 that is currently used by a number of district court judges in  
24 the District of Minnesota. Counsel will be directed to  
25 forewarn each witness that my clerk will take their photo

1     beside the witness stand when they come in; that way all of  
2     the photos will be identical, at least in background. The  
3     witness, after being photographed, will be sworn and testify.

4             At the end of the trial and after inspection by the  
5     parties, the photos will then be provided to the jury for  
6     their deliberations to assist the jurors's recollection of the  
7     witness -- witnesses as they evaluate the testimony in the  
8     case.

9             And, finally, the photos will be destroyed after the  
10    jury reaches its verdict.

11            The Court believes that this procedure will be  
12    extremely helpful to jurors. The Court does not know if there  
13    are any objections from the parties in this case, but to the  
14    extent that there are any such objections, the parties are  
15    directed to file those objections with the Court no later than  
16    noon on July 31st, 2008, two weeks from today.

17            So is there anything else?

18            MR. GOLDBERG: Not from the Government, Your Honor.

19            MR. SERCARZ: Your Honor, I have a scheduling issue.  
20    I think I can address the issue.

21            THE COURT: Okay. Go ahead.

22            MR. SERCARZ: I want to talk about with regard to  
23    Mr. Donato.

24            But if I recall correctly, and I may be wrong, there  
25    is a deadline for 404(b) disclosure, and we agree that there

1 was going to be another round of motions -- in limine motions,  
2 but we didn't schedule it.

3 Am I right?

4 MR. GOLDBERG: I don't believe that we have  
5 scheduled a deadline for the 404(b) either.

6 MR. SERCARZ: Does the Court wish to address these  
7 issues now or --

8 THE COURT: Well, let me hear from the Government  
9 since this is about 404(b).

10 MR. GOLDBERG: Well, what we were planning on doing  
11 was filing our 404(b) motion four or five weeks before the  
12 start of opening statements.

13 THE COURT: Remind me.

14 MR. GOLDBERG: Handing out questionnaires on  
15 September 2. It usually takes about two weeks before we get  
16 to openings; so we are thinking about we can do August 15th,  
17 which is actually the same deadline for the 3500 material and  
18 the exhibits.

19 THE COURT: That sounds fine to me.

20 Any problem with that?

21 MR. SERCARZ: The Court agreed that there would need  
22 to be a second round of motions. What prompted it is, as I  
23 mentioned, for example, that with regard to the disks or the  
24 purported conversations that the Government intended to  
25 introduce, there may be different confrontations and hearsay

1 concerns in this trial than there were in the trial when all  
2 of these statements presumably came in as admissions because  
3 Mr. Basciano was a participant in the conversations, and he  
4 was the one on trial.

5 If I recall correctly, without the minutes the Court  
6 said, yes. I can see there will be a second round of motions.

7 THE COURT: All right.

8 MR. SERCARZ: We are going to have an in limine  
9 motion regarding the expert, Agent Carillo, as well. I  
10 thought it might be helpful if we try to schedule that now.

11 THE COURT: Well, August 15th?

12 MR. SERCARZ: Your Honor, may I suggest that we have  
13 an opportunity to review the 404(b) material and to make our  
14 objections to that because that may inform any in limine  
15 motion we are making as well. My suggestion was going to be  
16 to do it later, and I hasten to ask --

17 THE COURT: I am sorry.

18 MR. SERCARZ: We can do it later, with time to  
19 digest the 404(b) material that we were given.

20 THE COURT: I need to digest the motions, we are --  
21 we are moving in the direction of the trial here.

22 The 22nd of August for any motions?

23 MR. SERCARZ: Your Honor, I will be away the week of  
24 the 18th.

25 Can we do it the 25th, which is a Monday?

1 THE COURT: That is fine.

2 Response from the Government, September 5th?

3 MR. GOLDBERG: That is fine.

4 THE COURT: All right.

5 MR. SCHOEN: I know everybody else is probably  
6 familiar with the regular schedule, but no court on Fridays?

7 THE COURT: Well --

8 MR. SCHOEN: We have those funny weeks.

9 THE COURT: We have the funny weeks with the Jewish  
10 holidays, and I thank you for the letter laying out the  
11 schedules for the Jewish holidays. My sense is that in the  
12 weeks in which we are taking two days for the Jewish holidays  
13 we will work a Friday. Otherwise, on weeks when we are --  
14 when we can go Monday through Thursday we will not work a  
15 Friday.

16 MR. SCHOEN: Thank you, Judge.

17 THE COURT: Oh, no, no. We won't have a trial on  
18 Friday. You will work the Friday.

19 MR. SCHOEN: Yes.

20 MR. REEVE: Your Honor, for informational purposes  
21 only.

22 I have discussed this with Government counsel. I  
23 recently learned that Mr. Indelicato is having some health  
24 problems. A series of test, upper GI tests were ordered. He  
25 was advised by the medical unit there that those --

1 sometimes -- the period is anywhere from 30 days to 90 days to  
2 get the tests done. I want to make sure that it happens well  
3 in advance so that if there are problems it can be dealt with  
4 before the trial starts.

5 I'm going to make an effort. The Government is  
6 going to make an effort. If I need the Court's assistance,  
7 I will let the Your Honor know. I just wanted to inform the  
8 Court.

9 THE COURT: Is he at the MDC?

10 MR. REEVE: Yes. He is, Your Honor. He is here.

11 THE COURT: All right.

12 MR. REEVE: We'll work on it, but I just wanted to  
13 highlight it.

14 THE COURT: You or Mr. Goldberg should let me know  
15 if there is a problem, and I will contact the warden, if  
16 necessary. I will try to move this along.

17 MR. REEVE: Thank you, Your Honor.

18 THE COURT: It needs to be handled before the trial,  
19 obviously.

20 MR. REEVE: Yes.

21 THE COURT: All right.

22 MR. REEVE: Thank you.

23 MR. SERCARZ: Your Honor, rather than wasting time  
24 by talking to Mr. Donato now and then come being back, it is  
25 my intent to make a motion to the Court and serve the

1 Government in connection with the fact there are only limited  
2 areas where the defendants can read disks of transcripts and  
3 have codefendant meetings with the disks available. I  
4 understand that those areas are in short supply.

5 In the event that I require the assistance of the  
6 Court in order to receive permission for those meetings, I  
7 would like the opportunity upon notice to the Government.

8 THE COURT: I take it that your client has been  
9 looking at these materials all along.

10 MR. SERCARZ: He has seen materials. There are some  
11 related to the second Basciano trial that are relevant to him  
12 that he hasn't seen.

13 THE COURT: When did that end? That was a long time  
14 ago.

15 MR. SERCARZ: Consider the blame mine in the effort  
16 to keep my client apprised and to allow him to participate in  
17 his own defense in a meaningful way, it would be better that  
18 he saw a disk rather than a hard transcript. And I understand  
19 that because there are a number of cases in which a number of  
20 defendants need access to a limited number of computers there  
21 have been problems.

22 MR. REEVE: And, Your Honor, to be fair, we just  
23 received letters -- discovery letters from the Government that  
24 indicates a number of CD of conversations and so there is new  
25 material that none of us have had access to and will obviously



1 pursue, and so it is relevant to that material as well.

2 THE COURT: Now, what I would suggest is that if you  
3 believe that your clients need additional library time to  
4 review the documents that are on disk that you first discuss  
5 it with the Government and have the Government contact the  
6 legal department at the MDC to attempt to arrange additional  
7 time. And if that doesn't work, then contact me.

8 MR. SERCARZ: Thank you, Your Honor.

9 THE COURT: Ms. Kellman, welcome.

10 Did you want to argue anything?

11 MS. KELLMAN: No. I will save my argument for the  
12 trial.

13 I just wanted to say, Judge, that in other cases  
14 there is a tremendous amount of disks that caused a problem at  
15 the MDC. The Government counsel and I have spoken on two  
16 other cases with Adam Johnson over at the MDC, and they have  
17 actually set up a war room where the defendants, without their  
18 lawyers, but have access to all of the computers to work  
19 separate on computers, separate from the library. And usually  
20 it's just a call from the United States Attorney's Office, "We  
21 need to be able to include these disks. Can you send them up  
22 there?" They ought to be able to provide access.

23 THE COURT: Mr. Goldberg.

24 MR. GOLDBERG: We will work it out. I am not  
25 hearing there is a problem at the moment. If there is, I will

1 make the calls that are necessary.

2 THE COURT: Fine.

3 Let me know if there is a problem.

4 All right. Is there anything else from the  
5 Government?

6 MR. GOLDBERG: No, Your Honor.

7 THE COURT: Anything else from the defense?

8 MR. REEVE: No, Your Honor.

9 Thank you.

10 MR. SERCARZ: No, Your Honor.

11 THE COURT: All right. We are -- our next meeting  
12 is when, the 2nd?

13 Oh, we should discuss the questionnaire. Is it  
14 ready?

15 MR. GOLDBERG: Your Honor, we supplied a  
16 questionnaire back in March. Your Honor has invited defense  
17 counsel to make objections or communicate objections to us.

18 I got an e-mail late last night highlighting some  
19 areas. I don't know if all of the defense attorneys have had  
20 an opportunity to review that. It came from Mr. Schoen.

21 Mr. Sercarz made a good suggestion, which I agree  
22 with, and that is there be some communication offline and we  
23 can resolve whatever problems there might exist. I would  
24 expect it can happen soon because -- subject, of course, to  
25 Your Honor's ruling on the anonymous jury motion, we will need

1 to start preparing those.

2 THE COURT: I think that we ought to reschedule one  
3 pretrial conference here in August so that we can go over any  
4 issues that occur in the next 30 days.

5 So is everyone available on the 21st or 22nd of  
6 August? Who is not here?

7 MS. KELLMAN: I am not.

8 MR. SERCARZ: I am not. That is my bad week.

9 THE COURT: The 25th of August? That is a Monday.

10 MR. SERCARZ: I am available.

11 THE COURT: Is everybody available?

12 MR. SERCARZ: Yes, Your Honor.

13 MS. KELLMAN: If we do the 26th, it would be easier  
14 for me.

15 THE COURT: The 26th of August at 11:00 a.m.

16 Is everyone available?

17 MR. SERCARZ: Your Honor, I have a sentencing in the  
18 State Supreme Court in New York.

19 THE COURT: How long do those usually take?

20 MR. SERCARZ: It is a question of first come first  
21 served, and I don't want to --

22 THE COURT: Can we do it in the afternoon?

23 MR. SERCARZ: Yes.

24 THE COURT: 2:00 o'clock?

25 MR. SERCARZ: Yes.

1           THE COURT: On the 26th of August, a Tuesday, for a  
2 status conference. This case is deemed a complex case for  
3 Speedy Act purposes. That designation continues until the  
4 trial.

5           Anything else?

6           All right. Thank you, everybody.

7           (Matter concluded.)

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